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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 59.

CARL ALDO MARZANI, ALIAS TONY WHALES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

NATIONAL LAWYERS GUILD.

ROBERT J. SILBERSTEIN,
Executive Secretary,
902 20th St. N. W.,
Washington 6, D. C.

Bedford V. Lawson, Jr.

HERMAN ROSENFELD,
291 Broadway,
New York, N. Y.,
Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT.

The National Lawyers Guild is a Bar Association with members throughout the United States and chapters in many important cities. It is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people." It believes that this case raises issues having a significant bearing upon the vitality of the American concept of due process.

The petitioner has been found guilty under a statute which punishes ". . . whoever shall knowingly and wilfully . . . make or cause to be made any false or fraudulent statements or representations . . . in any matter

within the jurisdiction of any department or agency of the United States . . ." (Tit. 18 U. S. C. A. [1940 ed.] sec. 80). He has been sentenced to a term of from one to three years. The indictment contained eleven counts; the convictions on nine have been reversed by the Court of Appeals. The remaining two counts arise out of statements allegedly made by petitioner in the course of a completely informal conversation with his immediate superior in the State Department.

The National Lawyers Guild is of the opinion that statements made by one person in government employ to another during the course of an informal conversation cannot be brought within the purview of the statute without doing violence to every precept of due process. Should this conviction be affirmed, then a substantial portion of the safeguards our judicial traditions have erected to protect those accused of crimes will be lost. Guilt will no longer be a matter of conscious wrongdoing but of fortuitous circumstance.

Because it holds these views, the National Lawyers Guild has secured the consent of the parties to the filing of this brief as amicus curiae.

ARGUMENT.

As Construed and Applied, the Statute Deprives the Petitioner of His Liberty Without Due Process.

In April, 1946, Marzani was asked for his resignation. One month later, he had an interview with Panuch at which the requested resignation was discussed (J. A. 48). No one else was present; no record was kept (J. A. 48, 55.) The conversation was kept on an informal note; Panuch addressed the petitioner by his first name (J. A. 49). It was the kind of talk two friends might have if one has a problem. Only toward the end of his direct testimony did Panuch think to describe the conversation as ". . . in the nature of an appeal from Fearing's request" for Marzani's resignation (J. A. 52).

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The Nature of the Crime Charged.

The crime with which the petitioner is charged consists of "knowingly and wilfully" making false statements as to matters within the jurisdiction of an agency of government. Even a statute as loosely phrased as this must recognize limits of application. At the very least proof is required showing that the defendant knew or should have known that his statements were being made to one who was then acting as an agent of the United States. *United States* v. *White*, 69 Fed. Supp. 562 (S. C. Cal. 1946). If the defendant did not know that the person to whom he spoke was in fact acting as such a representative, then the requisite intent is not established.

> "The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense, and not in one which makes manifest injustice or infringes constitutional safeguards." *Baender* v. *Barnett*, 255 U. S. 224, 225, 226 (1921).

There is a substantial difference between a knowing falsehood, and the falsehood with which the petitioner is charged. Ordinarily a misstatement of fact is not criminal. If it be under oath it may constitute perjury; if it be made in the course of the transaction of business with the Government it invites prosecution under Section 80. But in either case there must be proof that the essential element of the crime is present—that the oath was knowingly taken or that the defendant was conscious that he was dealing with a representative of an agency of government acting in his official capacity.

The Prosecution Must Prove Specific Intent.

Prosecutions under Title 18, U. S. C., sec. 52, the civil rights statute, which punishes those who, under color of state law or authority, deprive persons of federally pro-

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tected rights for reasons of color or race, pose problems similar to that presented by this record. The crime there is "wilfully" to subject a person to the deprivation of his civil rights. It has been held that proof merely that state officials caused the death of a prisoner before his trial was not sufficient to support a conviction under Section 52 without a finding of specific intent to deprive him, by that means, of a fair trial.

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." *Screws* v. *United States,* 325 U. S. 91, 103 (1945).

Without this specific intent, the court found, the statute might be invalid for indefiniteness. For then any action, no matter how conceived, which led to the denial of a federal right, might be punishable as a crime, *ibid,* 97.

The closeness with which this reasoning bears upon the case at bar should be apparent. Unless the statute is applied in such a way that proof of a specific intent to deceive an agent of government acting in his official capacity is made necessary, then anyone who speaks to a governmental employee, no matter for what reason and under what circumstances, may be found guilty of a crime. A dangerous device would thus be created through which those holding unpopular views could readily be eliminated. Indeed, it is difficult to examine this record without forming an opinion that the petitioner would not have been prosecuted but for his political views.

By its own admission the government had all the evidence against Marzani in its possession as early as 1944 (J. A. p. 68). It is very probable that it had this information even earlier in 1942 and 1943 (J. A. 244, 246, 248). Yet despite this no action was taken against Marzani. On the contrary his talents and training were employed in the

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most difficult and confidential tasks. In 1945 he was sent abroad for the Office of Strategic Services (J. A. p. 174). Upon his discharge from the Army, he was not only rehired but promoted to important posts within the State Department. Assuming that Marzani made the misstatements charged it is not contended that the United States was in any way prejudiced thereby. Yet the essence of the crime charged is fraud and deception. Under these circumstances there is only one logical explanation for this prosecution. It could serve to silence one who had spoken out for fundamental political, social and economic change. It is the vagueness and loose construction of the statute here which makes possible such a misapplication of our criminal law.

On the record here it does not appear that the petitioner realized, or should have known, that he was speaking to Panuch in an official way and not discussing a problem with him informally. In our view a proper construction of the words "wilful" and "knowing" precludes a conviction based upon such a conversation.

> "The word often denotes an act which is intentional, or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose." *United States* v. *Murdock*, 290 U. S. 389, 394 (1933).

The "bad purpose" in this case can only be the deliberate effort to deceive a representative of the United States in the course of the performance of his duties. It is this which the statute undertakes to punish. A falsehood told to Panuch as a private individual is obviously not the same as one told him as an official of the State Department acting in his official capacity. A wilful failure to pay income tax is not enough to establish the intent to attempt to evade the tax, *Spies* v. *United States*, 317 U. S. 492, 498 (1942). Thus a wilfully false statement to Panuch is not enough to prove a wilfully false statement to the Department of State. Confusion of the two can only lead to that degree of vagueness which will invalidate the statute.

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"The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. . . . But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States, supra,* 101, 102.

The Statute as Applied is Invalid for Indefiniteness.

The charge to the jury did not observe these precepts. So far as he dealt with questions of knowledge and intent at all, the trial judge referred only to the truth or falsity of the statements made by the petitioner. As he summarized the elements of the crime, it was not necessary that the jury find that Marzani intended to speak to Panuch in the latter's official capacity:

"It is incumbent upon the Government, as I have heretofore said to you, to prove all the essential elements of the crime charged. Briefly, these elements are:

1. That the defendant made the statements charged.

2. That the statements were false.

3. That the false statements were made wilfully, knowingly, and fraudulently." (J. A. 43).

Fraudulently was defined as "a deliberately planned purpose and intent to deceive and thereby gain an unlawful

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advantage" (J. A. 41). There was no attempt made to distinguish between a fraud upon Panuch as an individual and Panuch as an official of the State Department. The definition was in broadest possible terms and made it possible for the jury to conclude that no distinction need be made.

From this, the jury could well have concluded that if they were satisfied that the statements made by Marzani were knowingly false and that Panuch was in fact an agent of the United States and was or could have been misled by the falsehood, the petitioner was guilty, without regard to whether he intended to discuss his problem with Panuch in the latter's official capacity or not.

Such a construction of the statute does more than depart from the commonly accepted norms of criminal trials; it denies the petitioner due process. Under it, the petitioner's intent is without significance. Whether he was merely enlisting the sympathy of a man he supposed a friend or deceiving an official of the government is immaterial. A statute, which punishes equally an act innocent of intent to commit a fraud upon an agent of government and an act deliberately designed to that end, can not be deemed to provide the standard of guilt which due process requires. *Herndon* v. *Lowry*, 301 U. S. 242, 259 (1937).

Petitioner's motion for dismissal of the indictment, renewed in his motion for judgment of acquittal, should have been granted as to the last two counts, because it is apparent that the statute, as applied, fails to meet the requirements of constitutional definiteness. Under the indictment and the facts as shown by the record, even a proper instruction as to knowledge and wilfulness could not have supplied the requirements as to which all evidence was lacking, that petitioner's statements were required or that his obligations were defined.

This Court has considered the dangers inherent in the enforcement of the statute here involved, and while it sustained the indictment, it did so with an implied warning, singularly germane here:

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> "Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required have been sufficiently described and the duty enjoined has been adequately defined. Any one presenting the required affidavits and reports to the Board set up under the pertinent regulations was suitably charged with notice of the consequence of knowingly and wilfully including therein any false and fraudulent statements." *United States* v. *Gilliland*, 312 U. S. 86, 91 (1941).

Here, petitioner's statements were not required, his duty was not defined, no warning of consequences was given. The statute as applied is invalid for indefiniteness.

CONCLUSION.

The judgment of conviction should be reversed and the case dismissed.

National Lawyers Guild.

Robert J. Silberstein,
Executive Secretary,
902 20th St. N. W.,
Washington 6, D. C.

Herman Rosenfeld,
291 Broadway,
New York, N. Y.,
Counsel.

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